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No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1962

WALTER HUMPHREY, ETC., ET. AL.,
PETITIONERS

v.

C. W. MOORE, ETC., ET. AL., GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AND DEALERS TRANSPORT COMPANY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioners, Walter Humphrey, Howard Baker, Earl Surface, Ross Johnson, Arthur Gilpin and Ray Lewis, individually and as representatives of a class of employees of E. & L. Transport Company (hereinafter E. & L.), pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky in a cause captioned *C. W. Moore, etc., et al.* v. *Local Union No. 89, etc., et al.* As parties below (R. 89; 43, Tr. 196-199),[1] petitioners have

[1] The record filed in this Court is in four volumes; the first, containing the pleadings, is designated "Transcript of Record" and is referred to herein by the symbol "R"; volumes I and II and III combined, designated "Transcript of Testimony," contain the testimony and exhibits and are referred to herein by the symbol "Tr." Pagination of the volumes is consecutive, beginning with "R." References herein preceding a semi-colon are to findings; succeeding references are to evidence.

standing to seek certiorari. *International Union of Mine and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338-339.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 84-94), is reported at 356 S. W. 2d 241, and, together with its pertinent orders (R. 63-65, 80), is printed in Appendix A, *infra*, pp. 1a-16a. The opinion, order and judgment of the Jefferson Circuit Court, Chancery Branch, First Division (R. 55-57, 70), are printed in Appendix B, *infra*, pp. 17a-20a.

JURISDICTION

The judgment and order of the Court of Appeals, modifying its order granting permanent injunction (R. 80, 74-76), was entered on February 13, 1962 (R. 83). A petition for rehearing (R. 97), was overruled May 4, 1962 (R. 98). On July 17, 1962, Mr. Justice Stewart entered an order extending until September 4, 1962, petitioners' time to file a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether a state court infringes the statutory discretion and authority of the exclusive bargaining representative to bind its constituents, deprives employees of the benefits of statutory exclusive representation, interferes excessively with the federal collective bargaining process and violates the Supremacy Clause of the Constitution of the United States, by prohibiting parties to a collective bargaining contract affecting interstate commerce from interpreting it to require dovetailing of seniority lists upon absorption of one employer's business by another because in the opinion of the court dovetailing unfairly and unjustly deprives employees of the surviving employer of seniority rights secured by the contract.

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, et seq., are as follows:

Sec. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder * * *.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 203 (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement: * * *

Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. *The uncontested facts*

Dealers Transport Company, of Memphis, Tennessee (hereinafter Dealers), and E. & L., of Detroit, Michigan, rival carriers of new cars and trucks from the Ford Motor Company, Louisville, Kentucky, assembly plant (R. 84; Tr. 166), together with General Drivers, Warehousemen and Helpers, Local Union No. 89 (hereinafter Local 89), representing their Louisville terminal employees (R. 85; 6, 56, Tr. 142, 263-264), are members of a national, multi-employer, multi-local union, collective bargaining unit, having agreed to be bound (Tr. 159-160, 205, 251-252, 263), by the Automobile Carrier Truckaway Agreement, effective March 1, 1961 through February 29, 1964 (hereinafter the "Agreement"), a standard collective bargaining contract negotiated on behalf of authorizing employers by Automobile Transporters Labor Division and on behalf of local unions of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America by National Truckaway and Driveaway Conference (R. 86; 19, pp. 3, 81-82, Tr. 119-120, 206, 251-253, 262, 263).[2]

The Agreement provides (R. 19, pp. 22-23, Art. 7, Sec. 2(d)), that "all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee," (hereinafter the Committee), composed of an equal number of representatives of management and labor (R. 56; Tr. 188). Article 7 recites (Sec. 2(f), p. 23), that it is "the intention of the parties to resolve all questions of interpretation by mutual agreement," and provides (Sec. 2(e), p. 23), that "Any decision of the * * * Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." The Agreement also contains the following provision (Art. 4, Sec. 5, p. 14):

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[2] Cf. *Teamsters Union* v. *Oliver*, 358 U. S. 283, 284.

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (ARTICLE 7).

For some time prior to August, 1961, rumors reached Local 89 that Ford had decided, in view of its increased use of "piggy-back" rail transportation, to terminate one of its two Louisville carriers (Tr. 137, 163, 167, 254, 272). When it appeared that E. & L. would be the one to go, Paul W. Priddy, president of Local 89 (Tr. 261), instructed his assistant, Leslie H. Atterbury (Tr. 205), to interview "officials of the two companies to determine [whether] there was going to be a sale, merger, trade or whatever it might be" (Tr. 276). In a conference with local officials of both companies, Atterbury was informed "that there was no kind of a trade understanding, at all, between management of the two companies * * * that Ford Motor Company had seen fit to take the business from one carrier and give it to another carrier." (Tr. 210-211, 277-278). On the basis of this information (Tr. 219, 277), Priddy and Atterbury told the E. & L. men that it looked black for them and urged them to look for other jobs (Tr. 276, 210, 178, 180, 216), and Atterbury assured the Dealers' men that they had nothing to worry about (Tr. 132, 178, 208, 115-116).

Nevertheless, rumors circulated of a deal between E. & L. and Dealers (Tr. 220-222, 254). In August, 1961, two E. & L. employees, representing the class of petitioners herein, filed a grievance invoking Article 4, Section 5, of the Agreement and requesting that E. & L. employees be "sandwiched in" with Dealers' employees on the basis of seniority acquired at E. & L. and its predecessor company (R. 7, 87; Tr. 240, 269). When the grievance came before the local committee (see R. 19, Art. 7, Sec. 2(a) and (b), pp. 21-22; cf. Tr. 268-269), Priddy stated "this is a matter of interpretation and should rightfully be decided by the

people who negotiated the contract" (Tr. 271); whereupon, by unanimous agreement, the matter was "deadlocked" for submission to the full Committee (Tr. 186, 213, 240-243, 270-271). By that time Local 89 had discovered in the Federal Register an application by Dealers to obtain E. & L.'s secondary movement rights out of Louisville (Tr. 243-245). However, since neither company had revealed "that one of the companies was buying some of the rights," Local 89 did not "know for sure what the facts were." (Tr. 277).

Shortly before the hearing before the full Committee, Priddy told the three Dealers' stewards in attendance that he favored dovetailing the seniority lists and that to oppose it, as they wished, was "actually * * * a short sighted view because * * * three months or six months from now Dealers Transport may be completely out of the picture and another carrier in, then you too would have no job * * * ." (Tr. 272-274; 115-116, 135). On the assumption that there had been a trade of operating rights, Priddy urged the Committee to dovetail the seniority lists "in the interest of protecting the long time employees of both people, especially since the work is being transferred over to this other operation, in effect these people would be following their work." (Tr. 283).[3]

Mack Snites, Dealers' Vice President and General Manager, followed Priddy and confirmed that there had been an "understanding between management of the two companies," as to "which one was going to stay"; that "Ford didn't order either one of us out." (Tr. 283-284, 217-220, 163). He explained that, to consolidate geographically, E. & L. had agreed to sell its secondary authority out of Louisville to Dealers in exchange for Dealers' initial au-

[3] Priddy testified that his position would have been the same "had the other company been the successful one to stay" (Tr. 283, 272, 276, 278), and that the opposition of Dealers' employees could not be controlling because "we represent both people. * * * We have to present the facts and we have to protect people in spite of themselves." (Tr. 286). He specifically denied any hostility or bias against Dealers' employees. (Tr. 231, 267, 286).

thority out of Lorraine, Ohio (Tr. 166-168, 170, 217, 220). Snites admitted that pursuant to this trade Dealers "absorbed a certain portion of" the "business of E. & L." (Tr. 173, 283-284; cf. R. 7).

On the basis of this testimony (Tr. 283-284), the Committee issued a decision directing that within thirty days E. & L. employees "shall be sandwiched in" on Dealers' "master seniority boards." (Tr. 322, 324, 332). Dealers acquiesed (Tr. 171) and prepared to comply by replacing 96 junior employees of Dealers with senior E. & L. employees as of November 25, 1961 (Tr. 347-352).

B. *Proceedings below*

On November 8, 1961, C. W. Moore, an employee of Dealers, on his own behalf and on behalf of Louisville terminal employees of Dealers as a class, filed in the Circuit Court of Jefferson County a suit for injunction and damages to prevent Local 89 and Dealers from complying with the decision (R. 4-18; 24-33, 89). Petitioners herein, individually and as representatives of E. & L. employees as a class, were made defendants by amendment (R. 89; 43-44; Tr. 196-199). The gravamen of the complaint was that because E. & L. men, by and large, had more seniority than Dealers' men, dovetailing would result in unfairly displacing Dealers' employees; that a rider to the contract between Dealers and Local 89 (R. 15-18), guaranteed all Louisville job opportunities to Dealers' employees;[4] that Article 4, Section 6(b) 2, p. 15 of the Agreement, dealing with transfers from a closed branch, rather than Article 4, Section 5, dealing with absorption by one carrier of the business of another, was controlling;[5] and that Priddy had deceived plaintiffs as to Local 89's position and failed to represent them by

[4] The pertinent provision of the rider, which had been approved by the National Conference (Tr. 119, 232, 239), reads: "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal." (R. 16).

[5] Section 6(b) 2, provides that in cases of branch closings employees of the closed branch "shall go to the bottom of the seniority board."

causing petitioners' grievance to be sustained (R. 9-10). Petitioners and Local 89 moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action (R. 68, 54) and Local 89 because "the jurisdiction of this Court has been preempted by the provisions of the National Labor Relations Act" (R. 69).

The trial court, after hearing, denied both a temporary and a permanent injunction and granted the motion to dismiss (R. 55, 70). It concurred in the Committee's conclusion that Article 4, Section 5, governed and neither Article 4, Section 6, nor the rider, applied (R. 57). It further observed, "no contention is made that the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the Committee" and "it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented" (R. 56).

The Court of Appeals, two judges dissenting, reversed. While agreeing with the trial court that either of the provisions relied on by plaintiffs were pertinent (R. 89-90), it concluded that Article 4, Section 5, did not authorize the decision because it "deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure." (R. 90-91). The court rejected the parties' contrary interpretation on the ground that it was so "erroneous" and "violative of natural justice" as to be "arbitrary." (R. 91, 93).

The court further held that the Union had no "legitimate business" in the interpretation process except as "advocate" and that it was disqualified from participating

in that capacity because the interests of its constituents were in conflict and because its influence "stood to be enhanced by a decision permitting the employment and seniority of its members to cut across company lines." (R. 92-93). Finally, the court held that it had jurisdiction to substitute its interpretation for the parties' (R. 89), because state courts are empowered "to construe and enforce a contract under which [employees] have certain rights of tenure" (R. 94). In its view, absent a claim that denial was predicated upon union membership or activity, vindication of such rights pursuant to state law does not amount to exercise of "any jurisdiction in the field of national labor policy." (R. 94).

REASONS FOR GRANTING THE WRIT

The dovetailing arrangement which the court below set aside is the product of Local 89's performance of its federal duty of fair representation and of the mandatory federal process of collective bargaining. To allow this decision to stand would defeat Congress' object in fostering the entire system under the aegis of federal law. *Teamsters Union* v. *Oliver*, 358 U. S. 283, 294-297. And it would deprive petitioners of the benefits of exclusive representation which the National Act is designed to enable them to enjoy. *Hill* v. *Florida*, 325 U. S. 538.

The power of state courts to enforce contracts cannot, consistently with Congress' purpose, be deemed to include authority to narrow the scope of collective bargaining or stultify the process itself. A state may not enforce individual contracts incompatibly with the statutory authority and responsibility of the exclusive bargaining representative. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 337. *A fortiori*, state power to enforce collective agreements (*Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502), must be similarly limited, for the details of those contracts themselves express "the paramount force of the federal law." *Oliver* case, *supra*, at pp. 296-297; *Teamsters Local* v.

Lucas Flour Co., 369 U. S. 95, 103-104. Invocation of Section 301 as a sword against collective agreements[6] (R. 94), does indeed "turn the blade inward"; denial that the decision encroaches upon national labor policy at all simply ignores the principles of which that policy is composed.

1. As this Court observed in *Association of Westinghouse* v. *Westinghouse Electric Corporation*, 348 U. S. 437, 459, "[w]hen the employer and the union are in disagreement the question is * * * the extent to which the one may conclude the other." Federal law allocates to the exclusive bargaining representative power to make prospective as distinguished from retroactive adjustments involving interpretation and application of an existing agreement. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 739-740. Since petitioners' grievance involved future employment opportunities only, an adjustment binding upon all its constituents was within the province of the exclusive representative.[7] Denial of finality by a state court alters the federal line of demarcation between the authority of the bargaining representative and its constitutents.

2. Federal law precludes attaching to seniority benefits the status of vested rights in any sense which would impair the freedom and authority of the exclusive representative to bargain about them at any time. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U. S. 521, 525-527; *Ford Motor Company* v. *Huffman*, 345 U. S. 330,

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[6] "Parties to a contract may agree as to its meaning. * * * That is what the interpretation here amounted to." *Edelstein* v. *Duluth, M. & I. Ry. Co.*, 225 Minn. 508, 31 N. W. 2d 465, 472.

[7] *Lewellyn* v. *Fleming*, 10 Cir., 154 F. 2d 211, 214; *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10 Cir., 229 F. 2d 50, 56, cert. denied 351 U. S. 918; *Union News Company* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664-667; *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.*, 5 Cir., 159 F. 2d 822, 826-827, 828; *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123, cert. denied, 352 U. S. 937; *Edelstein* v. *Duluth M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N. W. 2d 465, 472-473; *Napier* v. *System Federation No. 91, Etc.* (W. D. Ky.), 127 F. Supp. 874, 888-889; *Fagan* v. *Pennsylvania R. Co.* (M. D. Pa.), 173 F. Supp. 465.

337-339, 342-343; cf. *Kent* v. *Civil Aeronautics Board*, 2 Cir., 204 F. 2d 263, 266, cert. denied, 346 U. S. 826.* Seniority benefits, like others derived from collective bargaining, are subject to restriction in the "continuous process" (*Campbell* case, *supra*, 337 U.S., at 525), of modification, interpretation and enforcement of the contract. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202; *Hughes Tool Co.* v. *NLRB*, 5 Cir., 147 F. 2d 69, 72-73. To permit states to immunize them would seriously impair the utility of collective bargaining as an instrumentality of industrial peace.

3. Resolution of conflicts over tenure, whether created by merger, absorption or otherwise, is the federal function of the exclusive bargaining representative.

"When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the [exclusive bargaining representative's] function is to resolve the competition by reaching an accommodation or

* There is widespread recognition that seniority rights are susceptible not only to interpretation but to change by agreement of the bargaining agent and the employer. *E. g.*, *Colbert* v. *Brotherhood of Railroad Trainmen*, 9 Cir., 206 F. 2d 9; *Hardcastle* v. *Western Greyhound Lines*, 9 Cir., 303 F. 2d 182, 188; *Pelicer* v. *Brotherhood of Railway & Steamship Clerks*, 5 Cir., 217 F. 2d 205, affirming S. D. Fla., 118 F. Supp. 254, cert. denied, 349 U. S. 912; (but cf. *Woodward Iron Co.* v. *Ware*, 5 Cir., 261 F. 2d 138); *Elder* v. *N. Y. Central R. Co.*, 6 Cir., 152 F. 2d 361, 364, 365; *Spires* v. *Southern Ry. Co.*, 4 Cir., 204 F. 2d 453; *Starke* v. *New York, Chicago & St. Louis R. Co.*, 7 Cir., 180 F. 2d 569; *Johnson* v. *Archer-Daniels Midland Co.* (E. D. Mich.), 203 F. Supp. 636, 638, 640; *Giordano* v. *Mack Trucks, Inc.* (D. N.J.), 293 F. Supp. 905; *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705, 707; *Cortes* v. *Ford Motor Co.*, 349 Mich. 108, 84 N. W. 2d 523; *Walker* v. *Penn-Reading S. Lines*, 142 N. J. Eq. 588, 61 A. 2d 453, 462-463; *Coley* v. *Atlantic Coast Line R. Co.*, 221 N. C. 66, 19 S. E. 2d 124; *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 121, 123, cert. denied, 352 U. S. 937; *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528; *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915; see also, *Oddie* v. *Ross Gear & Tool Co.*, 6 Cir., decided July 16, 1962,—F. 2d—, 45 C.C.H. L. C. par. 17, 728, p. 27186; *Zdanok* v. *Glidden Company*, 2 Cir., 288 F. 2d 99, 103, aff'd without consideration of this issue, 307 U. S. 530. In *Zdanok*, the Second Circuit considered seniority vested as against the employer but not as against the exclusive representative. The court below, in contrast, considers seniority vested as against the exclusive representative but not against the employer. See p. 8, *supra*, ¶, infra.

striking a balance. * * * A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer. * * * ." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 626, 627.

The only limitation which federal law imposes upon the representative's authority is the correlative prohibition against "hostile discrimination" based on union membership or activity (*Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U. S. 667, 675-676), or other "irrelevant" or "invidious" factors. *Steele* case, *supra*, 323 U. S., at 202, 204.; *Conley* v. *Gibson*, 355 U. S. 41, 46. The court below recognized the preemptive effect of the prohibition against discrimination based on union membership or activity, but it overlooked both the power of the representative to resolve conflicts of interest among its constituents and the correlative duty of fair representation, with their "inescapable implication of exclusiveness." *Gass* v. *Utah Labor Relations Board*, 353 U. S. 1, 10. There is "no room in this scheme" for "state policy limiting the solutions that the parties' agreement can provide." *Oliver* case, *supra*, 358 U. S., at 296; *Ostrofsky* v. *United Steelworkers of America*, D. Md., 171 F. Supp. 782, aff'd, 4 Cir., 273 F. 2d 614, cert. denied, 363 U. S. 849.

"The merger of two companies like the consolidation of once-separate operations into a single plant often gives rise to sharp conflicts of interest in working out the relative seniority rights of two once-separate groups of employees but the courts have invariably—and wisely—refused to become entangled in the merits of a conscientiously negotiated solution." Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 161.

Of course when job opportunities or security are diminished, no solution can satisfy all of the employees. But, "it is not violative of federal law that a union not satisfy all employees or that it improperly balance the rights and obligations of the various groups it represents." *Cunningham* v. *Erie Railroad Company*, 2 Cir., 266 F. 2d 411, 417. Dovetailing "on the basis of each employee's length of serv-

ice with his original employer * * *" is generally, indeed, considered the most equitable solution. Kahn, *Seniority Problems in Business Mergers*, 8 Ind. and Lab. Rel. Rev. 361, 378 (1955); *Kent* v. *Civil Aeronautics Board*, 2 Cir., 204 F.2d 263, 266, cert. denied, 346 U.S. 826; *Outland* v. *C.A.B.*, D.C. Cir., 284 F.2d 224, 226. That employees of one employer have longer service than employees of the other does not make that solution discriminatory. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339. "The seniority principle necessarily adversely affects some employees, particularly the younger employees." *McMullans* v. *Kansas, Oklahoma and Gulf Railroad Co.*, 10 Cir., 229 F.2d 50, 53, cert. denied, 351 U.S. 918. "Nothing in the * * * Act * * * so limits the vision and action of a bargaining representative that it must * * * limit seniority clauses solely to" (*Huffman* case, *supra*, at 343), employees of a single employer. Dovetailing is as common as merger and absorption are widespread.[9]

Both the National Labor Relations Board and the courts hold that dovetailing is within the ambit of the exclusive representative's statutory authority and discretion. *NLRB* v. *Wheland Company*, 6 Cir., 271 F.2d 122, 124-125; *Holman* v. *Industrial Stamping & Manufacturing Co.*, E.D. Mich., 142 F.Supp. 215, 218; Administrative Ruling of the General Counsel, Case No. SR-1973, May 17, 1962, 50 LRRM 1360.[10] Cf. *Local 483, Inter. Bro. of Boilermakers, Etc.* v.

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[9] Where, as in the transportation industry, "there is frequently consolidation and pooling of operations" the "practice * * * is generally to protect employees, to the extent possible, against loss of seniority as a result of the merger." 2 BNA, *COLLECTIVE BARGAINING—NEGOTIATIONS AND CONTRACTS* (5-26-61), 75:201. "Every industry with seniority practices has encountered seniority integration disputes at least sporadically, while some, especially in transportation, have been plagued by them. Although no satisfactory aggregate statistics are available on the frequency or magnitude of these disputes, they constitute an important industrial relations problem." Kahn, *op. cit., supra*, at pp. 362, 363.

[10] Accord: *Colbert* v. *Brotherhood of Railway Trainmen*, note 8, *supra*; *Pagan* v. *Pennsylvania R. Co.*, note 7, *supra*; *Brotherhood* v. *Girard Lodge*, note 8, *supra*; *Walker* v. *Penn-Reading S. Lines*, note 8, *supra*; *Pratt* v. *Wilson Trucking Co.*, note 8, *supra*.

NLRB, D.C. Cir., 288 F.2d 166, cert. denied, 368 U.S. 832. To upset dovetailing, "arbitrariness * * * of the bad faith kind, * * * [s]omething akin to factual malice" (*Cunningham* v. *Erie Railroad Company*, 2 Cir., 266 F.2d 411, 417); "an intent to hostilely discriminate against a portion of the union's membership" (*Hardcastle* v. *Western Greyhound Lines*, 9 Cir., 303 F.2d 182, 185), must be shown. There is neither allegation, evidence nor finding of that here.[11] This solution is "not one of a sort which Congress has indicated may be left to prohibition by the several States." *Oliver* case, *supra*, 358 U.S., at 296. "What is under the 'protection' of the federal Act in this case is the freedom to resolve at the bargaining table the problem of * * * seniority rights raised by [Dealers' absorption of E. & L.'s routes]. * * * To enjoin defendants * * * would be to unduly restrict that freedom of collective bargaining which the Supreme Court has declared to be one of the paramount objectives of the Federal Act." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 331.

4. The assumption that Local 89 was handcuffed by the conflict of interest between its constituents ignores not only the exclusive bargaining agent's legislative role, but its administrative function as well. To withhold from the bargaining agent authority to enforce the collective agreement against some of its members denies it power to protect the rights of others who, like petitioners, have a "meritorious grievance [which] is entitled * * * to [its] aid and countenance * * *." *Hughes Tool Co.* v. *NLRB*, 5 Cir. 147 F. 2d 69, 74; cf. Tr. 267. Barring the representative from determining whether a grievance has merit because a decision

[11] It is therefore unnecessary to reach the question reserved in *Huffman*, 345 U. S. 330, 332, note 4, whether breach of the duty of fair representation by hostile discrimination on grounds unrelated to union membership or activity is remediable in the first instance by the courts or exclusively by the NLRB. Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 172; *Holman* v. *Industrial Stamping* Co., 344 Mich. 235, 74 N. W. 2d 322, 333. It is reported that the General Counsel of the NLRB has for the first time authorized issuance of a complaint charging breach of that duty by discriminatory failure to process a grievance on racial grounds. BNA, 50 L.R.R. No. 33, "Summary of Developments," Aug. 27, 1962, p. 1.

one way rather than another will enhance its institutional prestige (R. 92-93), negates the teaching of this Court that the only enhancement prohibited "is that which is accomplished by discrimination." *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 675, 676. Cf. *Aeronautical Lodge* v. *Campbell, supra.* Impairment of the ability of the bargaining agent to afford "protection of employee rights already secured by contract" *(Conley* v. *Gibson*, 355 U.S. 41, 46), "frustrates the effort of Congress to stimulate the smooth functioning of [the collective bargaining process and] thus strikes at the very core of federal labor policy." *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 104.

The suggestion that Local 89 owed plaintiffs notice of the position it would take on petitioners' grievance (R. 88), likewise misconceives the statutory scheme. "The bargaining agent is * * * not required to consult with the individual members or give them notice of contemplated contractual actions within the scope of its authority. It has the authority to bind its principal, if it acts within the statutory provisions." *McMullans* v. *Kansas, Oklahoma & Gulf Railway Co.*, 10 Cir., 229 F.2d 50, 56, cert. denied, 351 U.S. 918; *Outland* v. *C.A.B.*, D.C. Cir., 284 F.2d 224, 226; *Fagan* v. *Pennsylvania R. Co.*, M.D. Pa., 173 F.Supp. 465, 473; *Coley* v. *Atlantic Coast Line R. Co.*, 221 N.C. 66, 19 S.E.2d 124, 126. To vitiate an agreement for lack of notice "would becloud collective bargaining with an invitation to the use of evasive tactics rather than clarity and purpose and would place the courts in constant attendance at the bargaining table * * *." *Napier* v. *System Federation No. 91, Etc.*, W.D. Ky., 1955, 127 F.Supp. 874, 891. Even if there had been a "misrepresentation"[12] of Local 89's position, the

[12] The insinuation of deception against Local 89's officers is as lacking in factual basis as the simile in which it is cast (R. 88). Those officers consistently explained both to Dealers' and to E. & L.'s employees that dovetailing would depend on whether or not there was a merger or absorption of E. & L.'s business by Dealers (Tr. 132, 208). As far as the record shows, their predictions were honestly based upon "current available information" (Tr. 207, 208, 210, 214, 216-217, 219-222, 226-227, 283-284).

court below would not have been entitled to disturb the agreement. *Durandetti* v. *Chrysler Corp.*, E.D. Mich., 195 F.Supp. 653, 655-656.

5. The decision below not only substitutes state law for federal, it defeats Congress' preference for the bargaining table over the courtroom as the forum for interpretation and application of collective agreements. Congress made it mandatory for the contracting parties to attempt to reach agreement on all questions "arising * * * under" collective agreements without outside intervention. Section 8(d). Resort to arbitration is encouraged only where the contracting parties are unable to agree among themselves. If courts "have no business weighing the merits of a grievance, considering whether there is equity in a claim, or determining whether there is particular language in the written instrument which will support the claim" *(United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568), when the parties are in disagreement, *a fortiori*, have they no business doing so when the contracting parties agree. To read the *Steelworkers'* cases as denying legal effect to an interpretation agreed on by the contracting parties, as the Sixth Circuit did in the *Riss* case,[18] is "inconsistent with the Act's terms, purposes and legislative history" (*Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 720-721; cf. *Alabaugh* v. *Baltimore & Ohio Railroad Company*, 4 Cir. 222, F. 2d 861, 867); it overlooks that encouragement of arbitration is a supplement to, not a substitute for, encouragement of collective bargaining.

6. Not alone in undertaking to substitute its interpretation of the contract for the parties', but in its interpretation as well, the court below violated national policy. To establish its predicate the court was compelled to fragmentize the federal multi-employer bargaining unit. Cf. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94-96. It did this by treating

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[18] *General Drivers, Warehousemen and Helpers, Local Union No. 89, et al. v. Riss Company*, 298 F. 2d 341, pending on petition for writ of certiorari, No. 180, this Term.

the fact that each employer and local union signed a separate copy of the printed contract as creating separate contract relationships. The National Labor Relations Board, on the other hand, treats such signatures merely as evidence of "consent to be bound" by the uniform contract and membership in the multi-party unit.[14]

The court's interpretation of Article 4, Section 5, leaves its applicability to the option of the absorbing employer. That defeats the plain intention of the parties to make it a binding commitment. *Great Lakes & St. L. T. Co.* v. *Scranton Coal Co.*, 7 Cir., 239 Fed. 603, 607. The sole justification offered is that "any other conclusion would reduce these employees to the status of pawns instead of free men" (R. 93). But the court's interpretation makes them "pawns" of the employer. Thus, the entire "practice and philosophy of collective bargaining" is destroyed for the sake of short run "individual advantages * * * paid at the long range expense of the group as a whole." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338-339. Just as an arbitrator cannot be permitted "to dispense his own brand of industrial justice" (*United Steelworkers* v. *Enterprise W. & C. Corp.*, 363 U.S. 593, 597), neither can a court.

CONCLUSION

If it is important to safeguard the province of outsiders to whom contracting parties refer questions of interpretation and application when they cannot agree, *a fortiori* is it important to protect the province of the parties to agree. Promotion of voluntary agreement is the heart of the collective bargaining policy, encouragement of arbitration only supplementary. Since the "complete satisfaction of all who are represented is hardly to be expected" (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338), to permit a voluntary agreement to be upset at the instance of disgruntled

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[14] *Neville Foundry Company*, 122 NLRB 1187, 1188; *Charles H. Harper and Frank Harper*, 117 NLRB 1031, 1032; NLRB, *Twenty Fourth Annual Report* (Govt. Print. Off., 1960), p. 40.

employees absent proof that they are victims of hostile discrimination is to make "the bargaining process • • • a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory." *Union News Co.* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664. Accordingly, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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August, 1962.

APPENDIX A

ORDERS—KENTUCKY COURT OF APPEALS

FALL TERM, DECEMBER 1, 1961

JEFFERSON CIRCUIT COURT

C. W. MOORE, Individually and for and on behalf of members of the Class, *Plaintiffs*

Vs: No.....

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Defendants*

TEMPORARY INJUNCTION

The above styled cause coming on to be heard this 29th day of November, 1961, on appeal to the Court of Appeals of Kentucky from an order of the Jefferson Circuit Court denying the temporary injunction to the plaintiff herein and the Court having considered the record and heard the argument of counsel herein and being advised;

It is hereby ORDERED AND ADJUDGED that the defendants, Local Union No. 89, General Drivers, Warehousemen, Helpers and Dealers Transport Company, and each of them, be and they are now and hereby enjoined from putting into effect or enforcing the decision of the Automobile Transporters Joint Conference Committee, which reads as follows:

"LOCAL UNION NO. 89 (LOUISVILLE) VS. DEALERS TRANSPORT CO., AND E & L TRANSPORT COMPANY OF KENTUCKY.

Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L Transport Co. of Ky. as to their seniority

rights with Dealers Transport Co., because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

DECISION: By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-section 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the employees of E & L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky, maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Co. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this de-

cision shall be posted on the bulletin boards at both companies.

And further that said temporary injunction shall be effective from this date until further orders of this court, on condition only that the plaintiff file a bond, with surety, in the amount of $50,000 with this court to pay such damages to the defendants, if any, as the said defendants may sustain by reason of this temporary injunction, if the court shall eventually decide that the plaintiff herein was not entitled to this temporary injunction.

It is further ORDERED and ADJUDGED that any action taken by the defendants herein to enforce the above set out decision shall be revoked and any employees who are members of the class of plaintiffs herein, who have lost their jobs by reason of said decision, shall be reinstated to their jobs pending further orders of the court.

November 29, 1961

/s/ ROBERT B. BIRD,
Judge

ORDERS—KENTUCKY COURT OF APPEALS

Fall Term, December 15, 1961

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, INDIVIDUALLY AND FOR
AND ON BEHALF OF MEMBERS OF THE CLASS, *Appellants*

Vs:

LOCAL UNION NO. 89, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER GRANTING PERMANENT INJUNCTION

This day this cause came on for hearing on appeal and the Court having reviewed and reversed the decision of the Jefferson Circuit Court herein, IT IS NOW ORDERED that the temporary injunction granted by this Court on the 29th day of November, 1961, be made permanent.

And, IT IS FURTHER ORDERED that the injunction bond, executed by the appellants in the sum of $50,000.00, be and it hereby ordered cancelled, set aside and held for naught.

The opinion herein will be written and rendered at a later date.

Entered this 15th day of December, 1961.

/s/ ROBERT B. BIRD,
Chief Justice

RENDERED: February 13, 1962
MODIFIED: May 4, 1962

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, *Appellant*

VS:

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Appellees*

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH—FIRST DIVISION
HON. MACAULEY L. SMITH, JUDGE

OPINION OF THE COURT BY JUDGE PALMORE

AFFIRMING IN PART
REVERSING IN PART

This injunction suit brought as a class action by a member of a labor union questions the right of the union and the plaintiff's employer, Dealers Transport Company, to carry out the terms of a decision relating to job seniority rights. The decision in question was reached through the grievance procedure set forth in a contract between the union and the employer. The chancellor upheld the decision and denied relief.

Dealers Transport Company, of Memphis, Tennessee, and E & L Transport Company, of Detroit, Michigan, were competitors in the transportation of new automobiles and trucks from the Louisville assembly plant of the Ford Motor Company. With the development of multi-level or "piggy-back" railroad shipments they began to lose business, and Ford advised both companies that eventually there would be room for only one of them. Following discussions over a period of 1½ to 2 years it was agreed between Dealers and E & L that E & L would withdraw, leaving the Louisville field to Dealers. This arrangement does not involve the sale or transfer of any equipment, facilities, or other property, but an application has been

made to the Interstate Commerce Commission for the transfer to Dealers of E & L's authority to make "secondary" runs out of Louisville. For this transfer Dealers is to pay a nominal consideration covering the expense of the transaction. There was and is no agreement between the companies calling for a transfer of any employees from one to the other.

Because of the increased competition from both rail and water shippers, Dealers and E & L decided also that it would be advisable for each of them to retrench by drawing its operations closer to home. So, at the same time the application was made for a transfer of E & L's secondary authority out of Louisville to Dealers, two other applications were submitted to the I.C.C., as follows:

(1) To authorize the sale and transfer to E & L of Dealers' initial authority out of Lorraine, Ohio, along with physical assets such as tractors, shop equipment, and terminal facilities there located.

(2) To authorize the sale and transfer to Dealers of E & L's secondary authority to serve New Orleans and Shreveport, Louisiana, and Jackson, Mississippi.

It was emphasized in the testimony that each of these proposed transfers is separate, none being contingent on either of the others. All are pending before the I.C.C.

Most if not all of the labor forces at both Dealers and E & L are members of Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which in turn is "affiliated" with two autonomous but apparently interlocking organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the National Truckaway and Driveway Conference. For convenience we shall refer to these three organizations as the Local Union, the International, and the National Conference.

The Teamsters Union, as it is commonly called, has represented the employees of E & L and its predecessor in

business for over 20 years and has represented the Dealers employees since 1955 or 1956. The National Conference, in behalf of its member local unions, is the exclusive representative of the employees for purposes of collective bargaining, and its standard contract for the period March 1, 1961, to February 29, 1964, printed in booklet form, has been separately executed by Dealers and by E & L. In each instance the agreement is signed by the Local, the National Conference, and the employer, but not by the International as such.

The standard contract secures job seniority rights to the employees. These rights are established, broadly speaking, on a terminal or local rather than a company-wide basis. For example, Article 4, Sec. 1 says: "Terminal seniority shall prevail at all times except as provided for in Article 4, Section 6, Subsection (b)2." The latter subsection provides that if a branch or terminal is closed or partially closed and its work transferred to another branch or terminal an employee transferring from one to the other shall go to the bottom of the seniority board for purposes of job selection but shall exercise his company seniority for lay-off purposes and all other contract benefits. When a new branch or terminal is opened a new seniority board is established, and an employee who transfers to it from another location loses his seniority rights at the old terminal at the end of 2 years. (In the case of Dealers, which established its Louisville terminal in 1955, there was a special exception under which the first 50 employees transferring from Memphis were permitted, for some reason not disclosed in the record, to carry with them the original seniority dates.)

The standard contract (Article 7, Section 2) further provides a grievance procedure under which "disputes" shall first be taken up between the employer and the local union involved. On their failure to agree the dispute is taken before a "Local Joint Committee" composed of both union and management representatives. If this committee cannot resolve the controversy it may be appealed to a body called

the Automobile Transporters Joint Conference Committee (hereinafter called the Detroit committee), which consists of both labor and industry-wide management representatives. When this panel is unable to agree the matter must be submitted to further arbitration.

Though E & L is still operating in Louisville, in August of 1961, when this controversy developed, a shift of business from E & L to Dealers obviously was taking place. As E & L began to drop its men employment at Dealers increased. Some of the E & L men were taken on by Dealers, but as the layoffs at E & L accelerated it was inevitable that there would be no room at Dealers for any more. Then it was that two of the former employees of E & L filed with the Local Union a grievance claiming that they and other displaced employees of E & L were entitled to employment by Dealers through a merger of the respective seniority list of the two companies.

Without taking the question up with Dealers (thereby omitting the first step in the grievance procedure), the Local Union submitted it to the Local Joint Committee, where at the recommendation of one of its members, Paul Priddy, president of the Local Union, it was "deadlocked," meaning that the Local Joint Committee decided to pass the problem to the Detroit committee for solution. The Dealers employees were disturbed at this turn of events, but their apprehensions were allayed by assurances from Mr. Priddy's assistant that they were protected by their terminal seniority rights and were not in any trouble. Three of these men attended the Detroit hearing, where they expected their interests to be represented and upheld by Mr. Priddy. But, like the innocent little oysters who took the famous walk with the walrus, they were mistaken, for, according to the testimony of Dealers' personnel manager, when Mr. Priddy had suggested to the Local Joint Committee that the grievance be "deadlocked" and sent to Detroit he remarked "That he knew Mr. Hoffa's thinking on matters of this nature and that these men were going to be sandwiched in." (Mr. Hoffa was president of the International,

chairman of the National Conference, and chairman of the Detroit committee.)

When the grievance was called on the docket of cases being heard before the Detroit committee, Mr. Priddy, who also was one of the members of that tribunal, vacated the bench, as was customary for the committee members to do when their own cases were involved. At this time he informed the three Dealers employees, to their surprise and consternation, that, he was going to take a stand in favor of merging the Dealers and E & L seniority boards. Representing the Local Unions, he thereupon proceeded to state the grievance to the Detroit committee and successfully recommend its solution on that basis. The decision of the Detroit committee, announced a few days after the hearing, was to the effect that the seniority registers of Dealers and E & L at Louisville were to be merged within 30 days.

E & L's Louisville terminal evidently is older than that of Dealers, which was established in 1955. This means that by and large the E & L employees will have greater seniority in the event the merger of seniority boards stands. For example, even with the right of the first 50 Dealers men who came from Memphis in 1955 to retain their original Memphis hire-in dates, out of the first 200 men listed on the new board only 58 will be Dealers Men. As a result, on November 25, 1961, just before this suit was filed, Dealers laid off 96 of its Louisville employees who were displaced by former employees of E & L.

The decision of the Detroit committee is being attacked in this case upon the grounds that it is so unjust as to imply fraud, or, to put it another way, that it is arbitrary and therefore subject to judicial inquiry and disposition. Specifically, the court is asked to enjoin the Local Union, the International (though it was not, as such, a party either to the contract or the grievance proceedings), and Dealers from carrying into effect the decision of the Detroit committee. Affected E & L employees were made defendants by amendment.

The question has been raised as to the amenability of International to process through service on the president of its affiliated Local Union. Since, however, International was not a party to the contract or the grievance proceeding we believe its connections with the controversy is insufficient to warrant any relief against it. Hence the judgment of dismissal as to International was correct and it is unnecessary to consider the jurisdictional point.

Appellant and his fellow-employees of Dealers rely heavily on one of the provisions of a special rider attached to the contract between Dealers and the Local Union. It reads as follows:

"The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."

This provision, or its progenitor, grew out of a controversy in Memphis in 1955, when the Memphis employees, during a slack period, sought to displace drivers of loads passing through Memphis from other points of origin. We agree with the chancellor that it is not dispositive of the problem that arose in this case. The real question was whether the E & L drivers are entitled to be employees of Dealers, and the Detroit committee ruled, in effect, that they were. If that is correct, then the rider provision had no more application to their employment that it would have to the hiring of a new employee from any other source.

The contract provision (Article 4, Section 5) on which the Detroit committee based its ruling to the effect that the E & L employees are entitled to employment by Dealers reads as follows:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

It is the theory of the E & L employees that the transfer to Dealers of E & L's secondary runs out of Louisville constitutes an absorption of business and that under this clause Dealers is required to absorb the affected employees as well as the business. We cannot find any such meaning in the clause. It deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure.

It must be remembered that even though Dealers and E & L have signed practically identical contracts with the same union, still they are separate agreements. These two employers, their respective employees, and the union are not one big happy family living under the same tent. As we see it, the displaced E. & L. employees can have no greater right to employment by Dealers than they would possess if they belonged to a different union, or to no union at all. Note, for example, that the contractual provision just quoted mentions "the *Unions* involved." (Emphasis added.) Suppose that the E & L men were represented by a different union. Would they have any rights under this contract between Dealers and another collective bargaining agent? Surely not. Nor would it be possible for them to initiate a grievance directed toward a company with which they had never enjoyed an employer-employee relationship. They are strangers to the Dealers contract, and it was not made for their benefit.

Since Article 4, Section 5, had no application under the circumstances of this case we are of the opinion that the question was not arbitrable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially. See discussion in *Harbison-Walker Refrac. Co.*

v. United Brick & C. Wrks., Ky. 1960, 339 SW 2d 933. But even if it were otherwise, we find the decision of the Detroit committee to be so erroneous, and made under such circumstances, that it was arbitrary.

Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its relations with its employees have been highly satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the "decisions of all agents to the employees who legally work for us." At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was "necessary due to Union action whereby the decision was rendered" by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand and the Dealers men on the other, all union members.

Representing these two antagonistic interests was the same union. It is useless to say that the union did not "represent" anyone in the grievance proceeding. Common sense verifies the testimony in this case to the effect that the men looked to and depended on their union officials to espouse their rights. Otherwise, what legitimate business does a union have in such a proceeding. It would be equally unrealistic to hold that the Dealers employees had representation before the Detroit Committee through the presence of three of their number who made the trip with Mr. Priddy and his assistant. As one of them said, he was only a shop steward and was not prepared or qualified to make a presentation to the national grievance panel. So we have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to

destroy the traditional presumption in favor of an arbitration award. Moreover, we cannot overlook the fact that even the advocate must have had an interest of its own, in that the power and influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines. Under these particular circumstances the solution of the controversy under the cloak of a spurious "grievance" against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2(d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand. This result is not in conflict but is consistent with the principles stated in *Smith v. Hillerick & Bradsby Co.*, Ky., 1952, 253 SW 2d 629.

The most difficult question in this case is whether the complaint of the suing employee is within the exclusive jurisdiction of the National Labor Relations Board.

Section 10(a) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 USCA § 160(a), empowers the NLRB "to prevent any person from engaging in an unfair labor practice . . . . . affecting commerce," subject to certain exceptions. Unfair labor practices are defined in Section 8 of the Act, 29 USCA § 158. An examination of the latter section convinces us that the controversy in this case does not involve an unfair labor practice. Section 8 (b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)." However, the latter subsection is confined to discrimination the purpose of which is "to discourage membership in any labor organization." Obviously, this is not such a case. Whatever may have been the end result of the actions of the union and the employer,

they were not motivated by any of the illicit objects and designs set forth in Section 8 of the Act as constituents of an unfair labor practice. As we see it, what we have here is not a labor dispute, but simply an action to construe and enforce a contract under which the complaining employee and his fellows have certain rights of tenure. By entertaining that action the courts of this state neither intend nor claim to exercise any jurisdiction in the field of national labor policy, which has been delegated by Congress exclusively to the NLRB. We find inferential support in that Congress has expressly authorized the federal courts to adjudicate suits for violation of labor contracts (29 USCA § 185), which means that the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem.

We recognize that if an activity is "arguably" subject to the Act "the States as well as the federal court must defer to the exclusive competence" of the NLRB. *San Diego Unions v. Garmon*, 1959, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775. However, we are not convinced that the question in this case is reasonably arguable.

Insofar as it dismissed the action against the International union the judgment is affirmed. Otherwise it is reversed with directions that a judgment be entered in accordance with this opinion.

Judges Moremen and Williams dissenting.

ORDERS—KENTUCKY COURT OF APPEALS

Winter Term, February 16, 1962

COURT OF APPEALS OF KENTUCKY

C. W. Moore, Individually, and for and on behalf of members of the class, *Appellants*

Vs:

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Dealers Transport Company, *Appellees*

ORDER MODIFYING THE ORDER GRANTING A PERMANENT INJUNCTION UNDER DATE OF DECEMBER 15, 1962.

The Court having this day rendered its opinion affirming in part and reversing in part this appeal from the Jefferson Circuit Court, now orders and directs that the order granting a permanent injunction dated December 15, 1962, be modified to conform to the opinion of the Court this day delivered.

IT IS SO ORDERED.

Entered this 13th day of February, 1962.

/s/Brady M. Stewart
Chief Justice.

ORDERS—KENTUCKY COURT OF APPEALS

Spring Term, May 4, 1962

Moore, Indiv., etc.,

vs.

Local Union No. 89, etc.
et. al. Jefferson

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellees' petition for rehearing be and the same is hereby overruled.

APPENDIX B

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, Individually and for and on Behalf of Members of the Class, *Plaintiffs*

v.

LOCAL UNION No. 89, *et al.*, *Defendants*

ORDER

This action having been tried to the Court on November 18 and November 24 on plaintiffs' motions for a temporary injunction, and the Court having heard the arguments of counsel, and being advised,

IT IS ORDERED as follows:

1. That the motion to quash the service of summons on the defendant, "International Brotherhood of Teamsters, Chauffeurs, etc.," served November 18, 1961, by delivering a copy to Paul Priddy, President of Local Union No. 89, be and it is sustained.

2. That the plaintiffs' motion for a temporary injunction against the implementation of the decision or arbitration award of October 18, 1961, by the Automobile Transporters Joint Conference Committee in Detroit be and it is overruled.

NOVEMBER 24, 1961.

/s/MACAULEY L. SMITH, *Judge*

MEMORANDUM OPINION

In this case, the employer, Dealers Transport Company, was engaged as a competitor of E & L Transport Company in the transportation of new cars and trucks from the Ford Motor Company, Louisville assembly plant. Some time in the Spring of 1961 Ford announced (probably because of

the increasing number of its vehicles being transported piggy back by rail carriers) that in the future it would deal only with one of the two. Negotiations followed between the two truckaway carriers, and they determined that, subject to ICC approval, Dealers Transport would take over E & L's routes out of Louisville and E & L would take over certain operations of Dealers in Ohio and out of Memphis.

A grievance by two employees of E & L, who anticipated losing their jobs, was filed with Local 89 which represented the (Louisville) employees of both employers. Without decision in Louisville, these grievances were forwarded to Detroit for hearing by the Automobile Transporters Joint Conference Committee. Plaintiffs complained that up until a few moments of the hearing in Detroit they were led to believe by the President of Local 89, Paul Priddy, and his chief agent (with respect to these two employers) Les Atterbury, that the position of Dealers Transport employees would be furthered by them before the Joint Conference Committee in Detroit; whereas, in fact, Priddy at the hearing made a statement favoring "sandwiching in" of the E & L employees into the Dealers Transport seniority list with the contemplated effect that a number of the latter will lose their seniority and may lose their jobs.

The Joint Conference Committee in Detroit is composed of equal representation of the representatives of labor and of industry, and no contention is made that the pertinent facts with respect to this proposed "merger" or "absorption" of routes were not truthfully disclosed to the Committee. While plaintiff and those whom he represents were disappointed in the action of their Local 89 representatives, there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented.

This Court conceives that the provisions of Article 4, Section 5, Page 14, in the printed Agreement effective March 1, 1961, governed this state of facts instead of

Article 4, Section 6, subsection 2 on page 17, of said printed Agreement. This Court cannot follow counsel for plaintiff's argument that the paragraph on page 2 of the four page rider to said contract, providing:—

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."—

is determinative of the controversy. When the E & L employees become employees of Dealers Transport, they will be Louisville domiciled employees of the employer, and this Court believes their rights are governed by Article 4, Section 5, mentioned above, and that a binding determination of the controversy was made in Detroit on October 18, 1961.

NOVEMBER 24, 1961

/s/ MACAULEY L. SMITH, *Judge*

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, *Plaintiff*

v.

LOCAL UNION No. 89, *et al., Defendants*

JUDGMENT

The parties by counsel having agreed that the within action might be submitted in chief to the Trial Court on the proof introduced herein November 18 and 24, 1961, on motion for temporary injunction together with brief additional testimony of Mr. Stoval heard this day, and the Court having considered all of said evidence, for the reasons stated in Memorandum Opinion filed herein on November 24, 1961,

IT IS ORDERED AND ADJUDGED as follows:

1. That plaintiff's motion for a permanent injunction against the implementation of the decision of the Automobile Transporters Joint Conference Committee in Detroit on October 18, 1961, be and it is overruled.

2. That plaintiff's complaint as amended be and it is dismissed.

3. That defendants recover of plaintiff their costs herein expended.

4. That the order of temporary injunction signed herein on November 29, 1961, by Chief Justice Bird be and it is continued in effect pending the contemplated appeal herein.

DECEMBER 4, 1961

/s/ MACAULEY L. SMITH, *Judge*